82-618

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ALEXANDER L. STEVAS,
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH A. KOSAK, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Jeffrey L. Naftulin
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QUESTIONS PRESENTED

1. Whether the provision of the Federal Tort Claims Act (FTCA) that bars claims "arising in respect of. . .the detention of any goods or merchandise by any officer of customs. . .," 28 U.S.C. §2680(c), precludes a claim against the United States for negligent and careless damage to property while in the custody of the Customs Service.

2. Whether the district court judge erred in dismissing the Petitioner's Complaint.

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OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a-11a is reported at 679F.2d 306 (1982). There is no opinion by the district court. A copy of the district court order is attached (App. D, infra, 14a.)

JURISDICTION

The judgment of the court of appeals (App. B, infra, 12a.) was entered on May 19, 1982. A petition for rehearing was denied on June 24, 1982 (App. C, infra, 13a) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Tort Claims Act, Act of June 25, 1948, 62 Stat. 982 (28 U.S.C. §§1346(b), 2671 et seq.).

28 U.S.C. §1346(b) -

> The district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . ., for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2680(c) -

> The provisions of this chapter (Tort Claims Procedure) and section 1346(b) of this title shall not apply to --
> . . . .
> (c) Any claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs. . . .

STATEMENT

On February 28, 1978, the Customs Service Agents acting with a search warrant, seized certain antiques, objects of art, and personal papers from the home of Appellant. Appellant was subsequently charged with

smuggling goods into the United States in violation of 18 U.S.C. §545, but was found not guilty on May 8, 1978 by a jury. (Appellant was in the navy stationed in Guam. He was transferred to the Philadelphia Naval Base and shipped home his oriental art collection. He was accused of falsifying a customs statement by listing his art collection as his own personal property rather than listing it for resale in the United States.)

On September 29, 1978, the Customs Service forwarded a "Notice of Penalty" to the Appellant informing him that his art collection was being forfeited. After Appellant filed a Petition to have his collection returned, the Customs Service returned the artifacts on June 1, 1979 in damaged condition.

After the Customs Service rejected Appellants claim for damages, suit was filed against the United States in District

Court seeking $12,300. in damages. The Appellee filed a Motion to Dismiss the Complaint which was granted by the District Court. The United States Court of Appeals for the Third Circuit affirmed in a three judge panel decision with one dissent.

REASONS FOR GRANTING THE PETITION

Various federal courts of appeals have been confronted with the issue of whether the FTCA provision which bars claims "arising in respect of . . . the detention of any goods or merchandise by any officer of customs. . .," 28 U.S.C. §2680(c), precludes a claim against the United States for negligent damage to property while in the custody of the Customs Service. These various courts have reached conflicting decisions on this issue. See Alliance Assurance Co. vs. United States, 252 F.2d 529 (2d Cir. 1958); A-Mark, Inc. v. United States Secret Service, 593 F.2d 849 (9th Cir. 1978); A & D International, Inc. v.

United States, 665 F.2d 669 (5th Cir. 1982); United States v. One (1) 1972 Wood, 19 Foot Custom Boat, FL 8443AY, 501 F.2d 1327 (5th Cir. 1974); United States v. One (1) Douglas A-26B Aircraft, 662 F.2d 1372 (11th Cir. 1981). The Supreme Court recognized this conflict in Hatzlachh Supply Co. v. United States, 444 U.S. 460, 462 n.3. (1980).

In the case at bar, the customs agents acted in a reprehensible manner. They posed as merchants from Abraham Weiner & Sons of Camden, New Jersey and tried to talk the Appellant into selling his art collection (which Appellant never did). When the government lost the case, they eventually returned Appellant's art collection. Some of the items were returned in a paper bag broken, cracked and damaged. There was great animosity between the customs agents and the Appellant throughout the case. If Appellant has no recourse for the damages he sustained, then there is nothing to prevent the Customs Service from smashing

or destroying any items it seizes as evidence before returning it to its rightful owner.

The Supreme Court in Hatzlachh Supply Co. v. United States, supra. discussed the legislative intent behind the exemption of §2680(c). The Court pointed out that an exemption was made in regard to the detention of goods by customs officers because "other laws provided the machinery for recovery on these claims", 444 U.S. 460, 463 n.4. In this case, there is no other machinery to recover (If there is another way for the Appellant to recover, he should be permitted to do so. The district court judge refused to consider this and this issue is addressed in this petition).

Furthermore, the third circuit in the case at bar also discussed the legislative intent. The court pointed out that "the group of exceptions that includes the exception for claims arising out of the detention of goods by customs officers covers 'claims which relate to certain

governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available. S. Rep. No. 1400, 79th Cong. 2d Sess. 33 (1946),'" Kosak v. United States, 679 F.2d 306, 308 (3rd Cir. 1982). There is no adequate other remedy and this is not the type of activity which should be free from the threat of a damage suit. Congress never meant to give the Customs Service a license to destroy property.

In the instant case, it was not the detention of these collectibles, but their careless and destructive mishandling by customs officials which caused the breakage and loss. The ninth circuit in A-Mark, Inc. v. United States Secret Service, supra. and Alliance Assurance Co. v. United States, supra. reasoned that the exemption of §2680(c) does not cover negligent handling of the goods but only bars damages for claims caused by the detention itself.

It is sensible to view §2680(c) as did the

court in Alliance and A-Mark. The exception provides an umbrella protection so that customs officials may inspect goods carefully and slowly, free from claims that their prolonged or illegal detentions have caused losses to Plaintiffs. The exception is not, however, a carte blanche to carelessness.

The Alliance court, supra., also pointed out one other important factor. §2680(b) expressly bars actions against the postal service for negligent transmission of postal matter. This court then went on to state:

> "If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U.S.C.A. §2680(b) shows that it would have been equal to the task. The conclusion is inescapable that it did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others." 252 F.2d 529, 534.

As was pointed out in the dissent in the case at bar, the Court should look at the logic and language of the exception. As was stated by Judge Weis,

"By its terms, it excludes any claim 'arising in respect of . . . the detention of any goods. . . .' Webster's Third International New Dictionary 1934 (1968) defines 'in respect of: to mean 'as to: as regards: insofar as concerns: with respect to.' These definitions indicate that the statutory exception is directed to the fact of detention itself, and that alone. The language is not broad enough to exempt a claim for damage occurring 'during' detention." 679 F.2d 306, 310.

The appellant had the right to have his property returned to him in undamaged condition. He should be compensated by the United States for the damage that was done.

The Appellant also asserts that the district judge erred in dismissing the Complaint. It should be noted that the district judge never gave a reason for the dismissal.

The ninth circuit addressed a similar situation in Griffen v. Locke, 286 F.2d 514 (9th Cir. 1961) wherein a district court judge dismissed a complaint without advising the parties of the basis for the dismissal. The court set aside the judgment of dismissal and remanded the cause to the district court with directions to the lower court to

advise the Appellant of the ground or grounds for dismissal and to permit the Appellant time to amend the complaint.

Appellant attempted to contact the district court judge to find out a reason for the dismissal and to allow the Appellant to amend his complaint. The district court refused to give a reason for its decision. As was stated earlier, if there is a remedy for Appellant, he should be permitted to pursue that remedy. Appellant should also be permitted to amend his complaint if he can state a cause of action by doing so.

Lastly, the federal courts are uniform in their position that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 2L.Ed. 2d 80, 78 S.Ct. 99, at 355 U.S. 45-46 (1957).

One of the items destroyed by Customs was

broken while the search warrant was being executed. It was not one of the items detained by Customs and thus the exemption does not apply. Also, damages were alleged for failure to return a stereo receipt which was seized with Appellant's personal papers. The exemption states that it is only for damage to goods and merchandise and thus it doesn't apply to damages caused by failure to return the receipt. Thus, even if the exemption barred most of Appellant's law suit, he still could prove a set of facts to recover for one of the items that was destroyed and for his damages in not getting back the receipt. Appellant should be permitted to pursue these claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Jeffrey L. Naftulin

September 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2855

KOSAK, Joseph A.,

Appellant

v.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 81-02054)

Submitted Under Third Circuit Rule 12(6)
April 27, 1982
Before: ALDISERT, WEIS, and BECKER, *Circuit Judges*
(Filed May 19, 1982)

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OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

The question presented by this appeal is whether the provision of the Federal Tort Claims Act (FTCA) that bars claims "arising in respect of . . . the detention of any goods or merchandise by any officer of customs . . .," 28 U.S.C. §2680(c), precludes a claim against the United States for negligent damage to property while in the legitimate custody of the Customs Service. We conclude that it does and therefore affirm the judgment of the district court that dismissed appellant's complaint.

I.

On February 28, 1978, Customs Service agents seized certain antiques and objects of art from the home of Joseph Kosak. He was subsequently charged with smuggling goods into the United States in violation of 18 U.S.C. §545, but was found not guilty. The Customs Service returned the detained property to him but Kosak

contended that certain items had been damaged as a result of Customs Service negligence during the detention. Alleging jurisdiction under 28 U.S.C. §1346(b),[1] he brought this FTCA action in district court seeking $12,310 in damages. The Government responded that Kosak's claim was barred because it fell under 28 U.S.C. §2680(c). The district court dismissed the complaint.[2]

Section 2680 enumerates several exceptions to the FTCA's general relaxation of tort immunity. Section 2680(c) specifies:

> The provisions of this chapter [Tort Claims Procedure] and section 1346(b) of this title shall not apply to —
>
> . . . .
>
> (c) Any claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs. . . .

Finding no decision of this court interpreting this section of the FTCA, appellant invites us to adopt the interpretation of the Second Circuit, as announced in *Alli-*

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1. 28 U.S.C. §1346(b), the jurisdictional section of the Federal Tort Claims Act, states:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. The district court did not specify the actual ground for dismissal — whether lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), or failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). Of itself this ambiguity will not cause us to set aside the district court's order. In light of the bar created by §2680(c), no set of facts will support the plaintiff's claim. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

ance Assurance Co. v. United States, 252 F.2d 529 (2d Cir. 1958), which held that §2680(c) applies only to claims based on injury caused by detention itself and not to losses caused by the Customs Service's negligent handling of goods during detention.

II.

The courts are divided in their interpretations of this section.[3] The divergence stems from the phrase "arising from the detention of goods. . . ." The *Alliance* court speculated that the

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3. The Supreme Court was presented with an argument similar to Kosak's in *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980) (per curiam). Although the Court summarized the conflicting interpretations of §2680(c), it expressly declined to resolve the conflict. *Id.* at 462 n.3.

A-Mark, Inc. v. United States Secret Service, 593 F.2d 849, 850 (9th Cir. 1978) (per curiam), is in accord with *Alliance* in that §2680(c) "reaches only those claims asserting injury as a result of the fact of detention itself where the propriety of the detention is at issue, and does not reach claims where the injury is asserted to result from negligent handling of property in the course of detention." *See also A & D International, Inc. v. United States*, 665 F.2d 669 (5th Cir. 1982) (accepting the *Alliance* distinction between losses and wrongful detention).

In contrast, the court in *United States v. One (1) 1972 Wood, 19 Foot Custom Boat, FL 8443AY*, 501 F.2d 1327, 1330 (5th Cir. 1974) (per curiam), observing that "28 U.S.C. §2680 specifically prohibits the bringing of any claim arising from the detention of any goods or merchandise by a customs officer," affirmed the denial of a counterclaim for damage to a boat and the loss of its service. The Supreme Court in *Hatzlachh* appropriately identified this Fifth Circuit decision as one in conflict with *Alliance*. 444 U.S. at 462 n.3. Nevertheless, the court in *A & D International* took issue with the Supreme Court's categorization, and declared that because the earlier decision dealt with a challenge to the propriety of the Custom Service's storage charges, it involved only detention of property. 665 F.2d at 672-73 & n.2. This explanation appears to us to be based upon a misreading of the earlier decision, for it is clear that the own-

> probable purpose of the exception was to prohibit actions for conversion arising from a denial by the customs authorities . . . of another's immediate right of dominion or control over goods in the possession of the authorities. . . . [and not] to bar actions based on the negligent destruction, injury or loss of goods in the possession or control of the customs authorities. . . .

252 F.2d at 534. Comparing 28 U.S.C. §2680(b)'s explicit preclusion of actions against the postal system "arising out of the loss, miscarriage, or negligent transmission" of mail, the *Alliance* court reasoned that if Congress had intended to bar actions claiming negligence of the customs officials, it would have done so in like manner. We disagree.

Alliance's rationale ignores the clear language of §2680(c), the legislative intent, and specific teachings of the Supreme Court regarding interpretation of exceptions to the FTCA. Statutory interpretation begins with the language of the statute itself.

> As in all cases involving statutory construction, "our starting point must be the language employed by Congress," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979), and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962). Thus "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Con-*

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er of the boat counterclaimed for damage to his property while it was in storage.

See also S. Schonfeld Co. v. SS Akra Tenaron, 363 F.Supp. 1220, 1223 (D.S.C. 1973) ("There is nothing in the language of the statute to indicate that erroneous seizure in the inception should be distinguished from improper retention or negligent handling of goods properly seized at the outset.").

sumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

American Tobacco Co. v. Patterson, U.S. (50 U.S.L.W. 4364, 4365-66, April 5, 1982).[4] In our view, the language of the statute covers all claims arising out of detention of goods by customs officers and does not purport to distinguish among types of harm.

Moreover, the legislative history of §2680(c) reveals no "clearly expressed legislative intention" contrary to the ordinary meaning of the section's language. The section-by-section analysis contained in the committee report on the bill provides only a brief statement that the group of exceptions that includes the exception for claims arising out of the detention of goods by customs officers covers "claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available." S. Rep. No. 1400, 79th Cong. 2d Sess. 33 (1946). There is nothing in the legislative history to show that this exemption was to be restricted to claims in conversion.

Our examination of the purposes of the statutory schema reinforces our view. In *Dalehite v. United States*, 346 U.S. 15 (1953), the Court makes clear that sovereign immunity is the rule, and that legislative departures from the rule must be strictly construed. The Court observed that the FTCA was an example of the

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4. The court's function in interpretation of statutes is also defined in *Rubin v. United States*, 449 U.S. 424, 430 (1981):

> When we find the terms of a statute unambiguous, judicial inquiry is complete, except "in 'rare and exceptional circumstances.' " *TVA v. Hill*, 437 U.S. 153, 187, n.33 (1978) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)). Accord, *Aaron v. SEC*, 446 U.S. 680, 695 (1980); *Ernst & Ernst v. Hochfelder*, [425 U.S. 185, 214 n.33]. No such circumstances are present here, for our reading of the statute is wholly consistent with the history and the purposes of the Securities Act of 1933.

step-by-step legislative relaxation of sovereign immunity and teaches that in interpreting these statutory modifications and their exceptions,

> courts include only those circumstances which are within the words and reason of the exception. They cannot do less since petitioners obtain their "right to sue from Congress [and they] necessarily must take [that right] subject to such restrictions as have been imposed." *Federal Housing Administration v. Burr*, 309 U.S. 242, 251.
>
> So, our decisions have interpreted the Act to require clear relinquishment of sovereign immunity to give jurisdiction for tort actions.

346 U.S. at 31 (footnotes omitted). Exceptions to the government's relaxation of immunity "are not to be nullified through judicial interpretation, since Congress clearly delineated the areas in which it did not intend to forfeit its immunity from suit." *Builders Corp. of America v. United States*, 320 F.2d 425, 426 (9th Cir. 1963), *cert. denied*, 376 U.S. 906 (1964).

Reading §2680(c) in this light, we find no "clear relinquishment of sovereign immunity."

> In cases of statutory construction, this Court's authority is limited. If the statutory language and legislative intent are plain, the judicial inquiry is at an end. Under our jurisprudence, it is presumed that ill-considered or unwise legislation will be corrected through the democratic process; a court is not permitted to distort a statute's meaning in order to make it conform with the Justices' own views of sound social policy. See *TVA v. Hill*, 437 U.S. 153 (1978).

Industrial Union Department v. American Petroleum Institute, 448 U.S. 607, 688 (1980) (Marshall, J., dissenting). Appellant's claim arises from detention of

goods by a customs officer, and therefore, whether it arises in negligence or in conversion, it is barred by §2680(c).

III.

The judgment of the district court will be affirmed.

WEIS, dissenting.

The interpretation of §2680(c) adopted by the majority in this case produces anomalous results. If a traveller handed an expensive oriental vase to a customs officer for inspection at a port of entry, and the officer carelessly dropped the vase, damages would be payable under the Federal Tort Claims Act. Under the court's holding today, however, that same individual would be without an FTCA remedy if the officer dropped the vase during a period of detention. I do not believe that the statutory language shows that Congress intended to bring about such inconsistent results by giving the Customs Service a license to harm property while it is being detained. Plaintiff had as much right to expect that the government would return his possessions intact, or else respond in damages, as any other person who is forced to temporarily relinquish his property to the government.

The Federal Tort Claims Act, 28 U.S.C. §§2671 *et seq.*, was Congress' response to complaints that sovereign immunity worked an injustice on citizens who had suffered personal injury or property damage through the negligence of government employees. In general, the statute waives sovereign immunity so that the government is liable in circumstances where private persons would be responsible for damages in tort. 28 U.S.C. §2674. Even under the general rule that a waiver of sovereign immunity must be narrowly construed, the loss at

issue here is plainly the type that Congress intended the government to recompense.

If the provisions of the statute stopped at that point, there is no question that the plaintiff would be entitled to recover on proof that his property was carelessly damaged by customs employees. But after providing a waiver of sovereign immunity, the FTCA goes on to list a number of exceptions, much like an insurance policy which initially grants coverage in broad terms and then refines it by a series of exclusions.

The purpose of strictly construing the waiver of sovereign immunity is served once the outer limits of the government's liability are demarcated. Thereafter, the specific exceptions that Congress listed should not be interpreted expansively against the citizen to defeat the general waiver, but rather should be limited to their terms. As the Supreme Court said in *Dalehite v. United States*, 346 U.S. 15, 31 (1953):

> "Of course, these modifications are entitled to a construction that will accomplish their aim, that is, one that will carry out the legislative purpose of allowing suits against the Government for negligence with due regard for the statutory exceptions to that policy. In interpreting the exceptions to the generality of the grant, courts include only those circumstances which are within the words and reason of the exception."

It is important, therefore, to look to the language and logic of the exception in 28 U.S.C. §2680(c). By its terms, it excludes any claim "arising in respect of . . . the detention of any goods. . . ." Webster's Third International New Dictionary 1934 (1968) defines "in respect of" to mean "as to: as regards: insofar as concerns: with respect to." These definitions indicate that the statutory exception is directed to the fact of detention itself, and that alone. The language is not broad enough to exempt a claim for damage occurring "during" detention. In

reaching the contrary conclusion, the district court reviewing §2680(c) in *S. Schonfeld Co. v. SS Akra Tenaron*, 363 F.Supp. 1220, 1223 (D. S.C. 1973), said that "the statute specifically bars 'any claim' arising out of the detention of goods." As noted, however, the statutory language is "in respect of," not "arising out of" — a subtle but nevertheless significant distinction.

Further support for my interpretation of §2680(c) is provided by *Alliance Assurance Co. v. United States*, 252 F.2d 529 (2d Cir. 1958), in which the Second Circuit held that Congress did not intend the statutory exception to bar actions based on the negligent destruction, injury or loss of goods in the possession of the customs authorities. Observing that §2680(b) expressly bars actions "arising out of the loss, miscarriage, or negligent transmission" of mail, the court reasoned:

> "If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U.S.C.A. §2680(b) shows that it would have been equal to the task. The conclusion is inescapable that it did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others."

Id. at 534. *In A-Mark, Inc. v. United States Secret Service*, 593 F.2d 849 (9th Cir. 1978), the Ninth Circuit also applied this reasoning to a factual situation similar to the one at hand, and held that §2680(c) did not bar recovery for damages to an article incurred during detention.

By contrast, neither of the appellate decisions that have denied recovery for damages analyzed the language or policy of §2680(c) before coming to their conclusion. *See United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372 (11th Cir. 1981); *United States v. One (1) 1972 Wood, 19 Foot Custom Boat*, 501 F.2d 1327 (5th Cir. 1974). It is also noteworthy that even

though *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980), did not resolve the conflict between the circuits, the Supreme Court did reverse the decision of the Court of Claims which had relied in part upon an expansive interpretation of §2680(c) that would bar recovery for damage to detained goods.

In summary, I am persuaded that the interpretation placed upon §2680(c) by the Second and Ninth Circuits is correct. The United States had a legal right to detain the plaintiff's property without liability for the damages which might be caused by the denial of possession. However, the government is not immune from liability for the harm it did to the property while it was being detained. I would reverse the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-2855

KOSAK, JOSEPH A.,
Appellant

vs.

UNITED STATES OF AMERICA

(D. C. Civil No. 81-02054)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, WEIS and BECKER, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was ~~argued by counsel~~ submitted under Third Circuit Rule 12(6) on April 27, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 15, 1981, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

Clerk

May 19, 1982

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-2855

KOSAK, Joseph A.,

Appellant

vs.

UNITED STATES OF AMERICA
(E.D. Pa. Civ. No. 81-02054)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges.

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Garth would grant the petition for rehearing.

By the Court,

Clerk

Dated: JUL 23 1982

SHD:tlr

(3)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. KOSAK,

Plaintiff : FILED

FILED OCT 15 1981

v. OCT 15 1981 CIVIL ACTION NO. 81-2054

MICHAEL E. KUNZ, Clerk

UNITED STATES OF AMERICA, : Dep. Clerk

Defendant :

O R D E R

AND NOW, this 13Th day of OCTOBER, 1981, upon consideration of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment and the memorandum in support thereof, it is hereby

ADJUDGED, ORDERED and DECREED

that such motion is granted and the Complaint is dismissed.

BY THE COURT:

J.

ENTERED: OCT 15 1981

CLERK OF COURT

Office-Supreme Court, U.S.
FILED
FEB 28 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-618

In The

Supreme Court of the United States

October Term, 1982

JOSEPH A. KOSAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOINT APPENDIX

JEFFREY L. NAFTULIN
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Counsel for Respondent

PETITION FOR CERTIORARI FILED
SEPTEMBER 21, 1981.
CERTIORARI GRANTED JANUARY 10, 1982.

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The following are Appendixes attached to Petitioner's Petition For Writ Of Certiorari:
Opinion of the United States Court of Appeals For The Third Circuit (App.A)
Judgment of the Court of Appeals (App.B)
Denial of Petition For Rehearing by the Court of Appeals (App.C)
Order of the District Court (App.D)

RELEVANT DOCKET ENTRIES

May 15, 1981	Complaint filed by Petitioner.
August 10, 1981	Motion to Dismiss, or in the Alternative, for Summary Judgment filed by Respondent.
October 13, 1981	Motion to Dismiss granted by District Court.
October 23, 1981	Appeal filed to the United States Court Of Appeals For The Third Circuit.
May 19, 1982	Order of District Court granting Motion to Dismiss affirmed.
June 24, 1982	Petition for Rehearing denied.
September 21, 1982	Petition for Writ of Certiorari filed.
January 10, 1983	Certiorari granted.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. KOSAK, Plaintiff	:	CIVIL ACTION NO. 81-2054
-vs-	:	
UNITED STATES OF AMERICA, Defendant	:	

C O M P L A I N T

PLAINTIFF, JOSEPH A. KOSAK, Alleges:

1. This action is based upon the Federal Tort Claims Act, Act of June 25, 1948 62 Stat 982 (28 USC §§1346(b), 2671 et seq.).

2. Prior to instituting the present action, plaintiff submitted the claim which is the subject of this action to the Department of the Treasury, United States Customs Service. That agency finally denied the claim, in writing, on November 24, 1980, which denial was mailed to Plaintiff by certified mail, a copy of which is attached hereto and marked Exhibit "A".

3. The Plaintiff, Joseph A. Kosak, resided in the above entitled judicial district at the time the acts and ommissions herein complained of occurred and the acts and ommissions herein complained of occurred in the above entitled judicial district.

4. The Department of the Treasury, United States Customs Service is a governmental agency, acting for and in behalf of Defendant herein.

5. The Department of Justice, United States Attorneys office is a governmental agency, acting for and in behalf of the Defendant herein.

6. On or about February 28, 1978, agents and employees of the United States Customs Service entered the home of Joseph A. Kosak without his permission and took part of his collection of oriental objects of art and antiques, and also seized his personal papers.

7. On or about March 20, 1978, through efforts of employees of the United States Attorneys office and the United States Customs Service, the Plaintiff was charged with violating 18 U.S.C. §545 -- smuggling goods into the United States; 18 U.S.C. §2 -- aiding and abetting; and 18 U.S.C. §371 -- conspiring in regard to the items taken from his home.

8. On or about May 8, 1978, the Plaintiff was found not guilty by a jury of violating the aforementioned offenses after a lengthy trial in the United States District Court for the Eastern District of Pennsylvania.

9. On or about September 29, 1978, the United States Customs Service forwarded a "notice of penalty" to the Plaintiff informing him that his collection was being forfeited.

10. Plaintiff then filed a Petition to have his collection returned to him.

11. On June 1, 1979, the Plaintiff's collection of oriental artifacts was finally returned to him in damaged condition.

12. While the United States Customs Service retained the Plaintiff's property, the Defendant negligently, carelessly, wrecklessly and wrongfully damaged and destroyed the Plaintiff's property.

13. The specific items damaged and the specific loss of the Plaintiff are outlined as follows:

a. antique ivory tusk	$ 1,209.00
b. set of antique ivory carved three warriors	1,682.00
c. pair of antique ivory carved warriors on horseback	1,375.00
d. antique ivory Confucious standing and smiling	1,187.00
e. pair of black nephrite jade rabbits	184.00
f. nephrite jade statue of girl watering flowers	147.00

g.	nephrite jade incense burner	2,791.00
h.	nephrite jade vase with rings	848.00
i.	nephrite jade horse under tree	996.00
j.	serpentine stone girl with broom	148.00
k.	ginger jar with temple dog design	44.00
l.	pair of porcelain vases	64.00
m.	cork carving of pagoda	110.00
n.	four sets of mother of pearl pictures	285.00
o.	antique porcelain ginger jar	179.00
p.	antique ivory Kwan Yin with 18 arms	761.00

14. In addition, the Plaintiff incurred damages in the amount of $300.00 to repair his stereo receiver because the United States Customs Service refused to return the receipt for same so that the Plaintiff could use the warranty to have the same

repaired for nothing.

15. The negligent, intentional, careless, wreckless and wrongful acts of the Defendant in handling, transporting, storing and caring for the Plaintiff's property were the sole, direct, and proximate cause of the Plaintiff's injuries and of Plaintiff's damage in the amount of $12,310.00.

WHEREFORE, Plaintiff prays for judgment against Defendant:

1. for damages in the amount of $12,310.00;
2. for costs of suit;
3. for legal interest; and
4. for such other relief as the court may deem proper.

By: /s/ Jeffrey L. Naftulin

Jeffrey L. Naftulin
Attorney for Plaintiff
Attorney I.D. #18671

90 North Main Street
Fidelity Bank Building
Doylestown, PA 18901
(215) 348-5455

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE

Baltimore, Maryland

Telephone (301) 962-4119 Nov 24 1980

REGISTERED MAIL - Refer To

RETURN RECEIPT REQUESTED FIS-3-RCL

Jeffrey L. Naftulin, Esquire
Fidelity Bank Building
90 North Main Street
Philadelphia, Pennsylvania 18901

Dear Mr. Naftulin:

This is in reference to the claim of your client, Joseph Kosak, filed under the Federal Tort Claims Act, for alleged damage to antique oriental articles, which were seized from his residence on February 28, 1978, by U. S. Customs Service Special Agents.

An investigation was conducted to determine the facts and circumstances of this claim. Our investigation disclosed the following. On February 28, 1978, in

conjunction with a search warrant, 223 items were seized by U. S. Customs from the residence of Joseph Kosak for violation of 19 USC 1592. On May 8, 1978, Mr. Kosak was found not guilty of the violation by a jury trial in the U.S. District Court for the Eastern District of Pennsylvania. It was also disclosed that Mr. Kosak had previously filed a claim with the U. S. Navy for some of the same items he claimed was damaged by Customs agents. Lt. Commander Kusiak, Personnel Claims Officer, Philadelphia Navy Yard, advised that Mr. Kosak's claim with the Navy was settled in January 1978 (before Customs seizure) in the amount of $4500.00.

The Federal Tort Claims Act grants to the head of each Federal agency or his designee authority, with certain exceptions, to consider and settle administratively claims for property damage or personal injury caused by the negligent or wrongful act or

omission of an employee of the Government while acting within the scope of his employment. However, we are without authority to consider your client's claim on its merits under the Federal Tort Claims Act. This is because the claim falls within one of the exceptions to the Act, specifically 28 USC 2680(c), which exempts from coverage by the Act "any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of Customs...." Since your client alleges that the merchandise was damaged while under Customs seizure, the claim falls within that exception. Accordingly, we are required to deny your client's claim. Under the governing regulations, we must advise you on behalf of your client that if he is dissatisfied with this decision he has the right to file suit in an appropriate

United States district court not later than 6 months from the date of mailing of this notification.

Sincerely yours,

/s/ John A. Hurley

John A. Hurley

Regional Commissioner

Exhibit "A"
11

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA Docket No.

VS. 78

A two story, reddish-brown brick townshouse with brown trimmings located at Regency Woods Townhouse Apts., Townhouse/Apt. K-3, being part of Complex K, at old Dublin Pike, Doylestown, Pennsylvania

Case No. 166M SEARCH WARRANT

To Francis X. Dufner, Special Agent, United States Customs Service, or any other authorized agent:

Affidavit(s) having been made before me by Special Agent Francis X. Dufner, United States Customs Service.

that he has reason to believe that on the premises known as A two story, reddish-brown brick townhouse with brown trimmings located at Regency Woods Townshouse Apts.,

Townhouse/Apt. K-3, being part of Complex K, at Old Dublin Pike, Doylestown, Pennsylvania.

in the Eastern District of Pennsylvania there is now being concealed certain property, namely statues, carvings, fruit pieces, pictures, vases, jars, stone trees and flowers, made of jade, nephrite, serpentine, quartz, amethyst, melachite, ivory, mother of pearl, cloisonne, porcelain, tsingtien, longevity, tibet, soap, and cork which are more particularly described in Exhibits "A" and "C" which are attached hereto and made a part hereof and all invoices, entry documents, waybills, cancelled checks, ledgers, certificates of origin and authenticity and correspondence which are evidence of entry of goods by means of false statements in violation of Title 18, U.S.C. Section 542, and smuggling goods into the United States in violation of Title 18, U.S.C. Section 545.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of _____ (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search

in the daytime (6:00 a.m. to 10:00 p.m.)

at any time in the day or night

and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before Hon. Peter B. Sciderі as required by law.

Dated this day of FEB 28 1978, 1978.

/s/ Peter B. Scuderi

Hon. Peter B. Scuderi

Office-Supreme Court, U.S.
FILED
DEC 9 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-618

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH A. KOSAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX F. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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No. 82-618

JOSEPH A. KOSAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that his claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, for negligent damage to certain goods seized by the Customs Service is barred by the exception in the FTCA for "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." 28 U.S.C. 2680(c).

1. When petitioner, then a member of the Navy, was transferred to Philadelphia from his former station in Guam, he brought with him a number of items of oriental art. On February 28, 1978, agents of the United States Customs Service, acting under authority of a search warrant, seized certain of these art objects on suspicion that petitioner had brought them into the United States intending to resell them, contrary to the statements contained in

his customs declaration (Pet. 2-3). Following a jury trial, petitioner was acquitted of the charge of smuggling the goods into the country in violation of 18 U.S.C. 545 (Pet. App. 2). Thereafter, the Customs Service notified petitioner that the goods were subject to civil forfeiture for violation of 19 U.S.C. 1592. Petitioner filed a petition for relief from the forfeiture under 19 U.S.C. 1618, which the Customs Service subsequently granted. The Service returned the goods on June 1, 1979 (Pet. 3).

On September 21, 1979, petitioner filed an administrative claim with the Customs Service, alleging that some of the art objects had been damaged by the government while being seized or while in the government's possession. Relying on the exception in 28 U.S.C. 2680(c), the Customs Service denied the claim (Pet. 3). Petitioner then filed suit in the United States District Court for the Eastern District of Pennsylvania. That court granted the government's motion to dismiss the complaint (Pet. App. 14).

The court of appeals affirmed, with one judge dissenting (Pet. App. 1-11). Noting (*id.* at 4 & n.3) that the lower courts have disagreed as to the scope of Section 2680(c), and that this Court declined to resolve that disagreement in *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 462-463 n.3 (1980), the court of appeals aligned itself with the decisions holding that the exception embraces all claims for damages arising out of the detention of goods in the custody of the Customs Service, and not merely claims for damages caused by the fact of detention alone. The court declined to follow the leading contrary case, *Alliance Assurance Co.* v. *United States*, 252 F.2d 529 (2d Cir. 1958), because its "rationale ignores the clear language of § 2680(c), the legislative intent, and specific teachings of the Supreme Court regarding interpretation of exceptions to the FTCA" (Pet. App. 5).

2. The decision of the court of appeals is correct and does not merit this Court's review. And, as in *Hatzlachh Supply Co.* v. *United States, supra,* 444 U.S. at 462-463 n.3, there is no need for the Court to resolve the conflict between the decision below and the 1958 decision of the Second Circuit in *Alliance.*[1]

a. This Court has repeatedly held that the plain and ordinary meaning of the language used in a statute must be given effect, unless there is strong evidence that a different reading was intended. See, *e.g., Consumer Product Safety Commission* v. *GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). There is nothing in the language of Section 2680(c) that would justify reading into it a distinction between a claim for consequential damages due to wrongful detention of goods and a claim for damages for negligent handling of goods properly detained. The section uses extremely broad language. It bars recovery on "[a]ny claim arising in respect of * * * the detention of any goods" by a customs officer. Because petitioner's claim is for damage done to his goods during and as the result of their detention by the Customs Service, it is a "claim arising in respect of" that detention, and thus outside the government's consent to be sued in tort.[2]

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[1] *Alliance* was followed by the Ninth Circuit in a short, per curiam opinion that quotes the entire discussion of the issue in *Alliance* but adds no additional discussion. *A-Mark, Inc.* v. *United States Secret Service,* 593 F.2d 849 (9th Cir. 1978). See also *A & D International, Inc.* v. *United States,* 665 F.2d 669 (5th Cir. 1982). On the other hand, the position adopted by the Third Circuit in the instant case was also taken in *United States* v. *One (1) Douglas A-26B Aircraft,* 662 F.2d 1372 (11th Cir. 1981); *United States* v. *One (1) 1972 Wood, 19 Foot Custom Boat,* 501 F.2d 1327, 1330 (5th Cir. 1974); and *S. Schonfeld Co.* v. *Steamship Akra Tenaron,* 363 F. Supp. 1220 (D.S.C. 1973).

[2] Judge Weis in dissent suggested that the term "in respect of" limits the coverage of the exception and that the exception would be significantly broader if the section had been written to cover any claim

Nor does petitioner cite any legislative history that would require, or even suggest, his limited reading of the exception. Congress never explained the intended scope of the customs exception; it stated only that the exceptions taken as a whole bar "claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available." S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946). A prohibition against claims for negligent damage to goods properly detained by the Customs Service in the course of enforcing the customs laws is consistent with this statement of general purpose.

b. In any event, the issue does not merit review by this Court. Although there currently is a disagreement among the circuits on the correct construction of Section 2680(c), the issue arises only sporadically. Moreover, this issue of statutory construction is not significant, as evidenced in part by the government's decision not to ask this Court to resolve the conflict following the adverse decision in *A-Mark, Inc.* v. *United States Secret Service*, 593 F.2d 849 (9th Cir. 1978) (see note 1, *supra*).

Equally important, the existence of alternative remedies makes reliance on the FTCA unnecessary. As the government acknowledged in *Hatzlachh* (444 U.S. at 465-466), the law has long recognized that one may bring a tort action against the customs collector personally for negligent damage to goods in his possession. See *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146 (4th Cir. 1974). The successful plaintiff in such an action need not worry that a judgment against the revenue officer will not be paid, for if the court certifies that the detention was made with probable cause,

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"arising out of" a detention (Pet. App. 9-10). In our view, there is little, if any, difference between the two phrases; they are equally broad restrictions on the waiver of sovereign immunity.

or that the officer acted under the direction of another government officer, then any judgment against the officer will be indemnified by the United States. 28 U.S.C. 2006.[3]

There may also be a second alternative remedy. In *Hatzlachh*, the Court held that the FTCA does not bar the filing of an action for breach of contract under the Tucker Act, 28 U.S.C. 1491. The Court remanded the case to the Court of Claims to determine whether there was an implied-in-fact contract of bailment. Justice Blackmun dissented (444 U.S. at 466-468). He agreed that the FTCA did not bar resort to the Tucker Act, but concluded that no implied-in-fact contract could arise from the seizure and forfeiture of goods under the customs laws. Because the Court of Claims has no jurisdiction over contracts implied in law, see *United States* v. *Minnesota Mutual Investment Co.*, 271 U.S. 212, 217-218 (1926), Justice Blackmun thought that the Court's remand in *Hatzlachh* "is, or should be, a useless exercise leading to an inevitable result" (444 U.S. at 467).

The remand proceedings in *Hatzlachh* are still pending. On remand, the government has argued, as suggested by Justice Blackmun, that the seizure and forfeiture of goods under the customs laws does not create an implied-in-fact contract of bailment. Should that argument prove unsuccessful, however, persons such as petitioner will be able to seek redress under the Tucker Act as well as through private damages actions against customs officials.[4] We therefore

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[3]Petitioner's goods were seized in 1978 and returned to him in 1979. Assuming that a suit against the customs agents personally would be decided under Pennsylvania law, where the seizure took place and where petitioner and presumably the customs officials involved in his case reside, the applicable statute of limitations would appear to be two years. See 42 Pa. Cons. Stat. Ann. § 5524(3) (Purdon 1981). Petitioner's failure to take timely advantage of this alternative remedy furnishes no basis for this Court's intervention.

[4]The six-year statute of limitations contained in 28 U.S.C. 2401(a) has not yet expired in petitioner's case.

believe that it would be premature for the Court to consider the proper scope of Section 2680(c) at this time. Only after the conclusion of the remand proceedings in *Hatzlachh* will the Court be in a position to determine whether the absence of an FTCA remedy is of any practical significance. If Justice Blackmun's view prevails, there will be time enough for the Court to construe Section 2680(c) in a future case.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1982

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[5]Petitioner makes two additional claims that do not merit this Court's review. First, he argues that the district court did not give a reason for its dismissal of the complaint (Pet. 9-10), but the government relied on Section 2680(c), leaving little doubt as to the district court's rationale. Furthermore, any defect in the district court's order was cured by the court of appeals, which was explicit in its rationale for affirming. Petitioner next argues that even the government's interpretation of Section 2680(c) would not cover two items — one article damaged during the seizure but not detained and a stereo that could not be repaired under warranty because the government had seized the receipt (Pet. 10-11). This argument, which is of little continuing importance, was not made to the court of appeals and should not be considered now.

DOJ-1982-12

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FILED
FEB 28 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-618

In The

Supreme Court of the United States

October Term, 1982

JOSEPH A. KOSAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

JEFFREY L. NAFTULIN
90 North Main Street
Doylestown, PA 18901
(215) 348-5455
Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the provision of the Federal Tort Claims Act (FTCA) that bars claims "arising in respect of. . .the detention of any goods or merchandise by any officer of customs. . .," 28 U.S.C. §2680(c), precludes a claim against the United States for negligent and careless damage to property while in the custody of the Customs Service.

2. Whether the district court judge erred in dismissing the Petitioner's Complaint.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 679F.2d 306 (1982). (Pet. App.A, 1a-11a.) There is no opinion by the district court. (Dist. Ct. Order, Pet. App.D, 14a.)

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1982. A Petition for Rehearing was denied on June 24, 1982. The Petition For Writ Of Certiorari was filed with this Court on September 21, 1982. On January 10, 1983, Certiorari was granted on this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Tort Claims Act, Act of June 25, 1948, 62 Stat. 982 (28 U.S.C. §§1346(b), 2671 et seq.)

28 U.S.C. §1346(b) -

> **The district courts...shall have exclusive jurisdiction of civil**

> actions on claims against the United States, for money damages, ..., for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2680(c) -

> The provisions of this chapter (Tort Claims Procedure) and section 1346(b) of this title shall not apply to --... .
> (c) Any claim arising in respect of...the detention of any goods or merchandise by any officer of customs....

STATEMENT OF THE CASE

On February 28, 1978, the Customs Service Agents acting with a search warrant, (J.A."B"11), seized certain antiques, objects of art, and personal papers from the home of Petitioner. Petitioner was subsequently charged with smuggling goods into the United States in violation of 18 U.S.C. §545, but was found not guilty on May 8, 1978

by a jury. (Petitioner was in the navy stationed in Guam. He was transferred to the Philadelphia Naval Base and shipped home his oriental art collection. He was accused of falsifying a customs statement by listing his art collection as his own personal property rather than listing it for resale in the United States.)

On September 29, 1978, the Customs Service forwarded a "Notice of Penalty" to the Petitioner informing him that his art collection was being forfeited. After Petitioner filed a Petition to have his collection returned, the Customs Service returned the artifacts on June 1, 1979 in damaged condition.

After the Customs Service rejected Petitioner's claim for damages, suit was filed against the United States in District Court seeking $12,310.00 in damages. (J.A."A"1-10). The Respondent filed a Motion to Dismiss the Complaint which was granted by the District Court. The United

States Court of Appeals for the Third Circuit affirmed in a three judge panel decision with one dissent.

SUMMARY OF ARGUMENT

The legislative history of the exemptions under section 2680 were made because as a matter of public policy the Government should be exempt from certain types of law suits or there are other adequate remedies available. These reasons do not apply to the exemption for the customs service under section 2680(c).

The exemption under section 2680(c) applies only for damage caused by the detention itself and not for the negligent or careless destruction of property while it is in the possession of the customs service.

Congress specifically exempted the postal service for negligence and never intended to exempt the customs service.

The District Court should not have dismissed the complaint because the Petitioner can prove damages for two items which were not detained.

ARGUMENT

I. THE FEDERAL TORT CLAIMS ACT DOES NOT BAR AN ACTION FOR DAMAGE TO DETAINED PROPERTY CAUSED BY NEGLIGENCE.

A. THE LEGISLATIVE HISTORY OF §2680(c) DOES NOT BAR A CLAIM FOR DAMAGE CAUSED BY THE NEGLIGENCE OF THE CUSTOMS SERVICE.

The loss suffered by the Petitioner through the damage to his property was of the type that Congress intended the government to recompense. Petitioner should be compensated by suit brought through the Federal Torts Claims Act, 28 U.S.C. §§2671 et seq. This act abolished sovereign immunity when citizens incurred injury or damage because of the negligence of government employees.

The issue then becomes whether 28 U.S.C. §2680(c) bars the Petitioner from bringing his action for negligence. When Congress passed the exemptions specified in 28 U.S.C. §2680, it did so because they were "claims which relate to certain governmental activities which should be free from the threat of damage suits, or for which adequate remedies

are already available". S. Rep. No. 1400, 79th Cong. 2d Sess. 33 (1946). This legislative history is also cited in Hatzlachh Supply Co., Inc. v. United States, 444 U.S. 460 (1980) and Kosak v. United States, 679 F.2d 306 (3rd Cir. 1982).

This Court pointed out in Hatzlachh, Supra. that the intended effect of the exemptions to §2680 were included "because they related to activities for which, as a policy matter, the Government should be free from tort claims...or because other laws provided the machinery for recovery on these claims", 444 U.S. 460, 463 n.4, 100 S.Ct. 647, 649 n.4 (1980) citing from Tort Claims Against the United States: Hearings on S. 2690 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., 38 - 39 (1940). In this footnote cited by this Court, Judge Alexander Holtzoff, who was testifying, made a distinction between exemptions for the postal service which should be exempted as a policy matter and claims against the customs

service which should be exempted because other laws provide a remedy. The entire footnote is listed verbatim as follows:

> When Congress first considered the exception in 1940, Judge Alexander Holtzoff, then a Special Assistant to the Attorney General, testified before the Senate Judiciary Subcommittee considering the bill. As the then Mr. Holtzoff described the intended effect of the various exemptions, certain of them, such as the loss or miscarriage of postal matter and certain intentional torts, were included because they related to activities for which, as a policy matter, the Government should be free from tort claims. Other exemptions, such as the assessment or collection of taxes or customs duties, the detention of goods by customs officers, and admiralty or maritime torts, were included because various other laws provided the machinery for recovery on these claims and "[t]here was no purpose in interfering with that machinery." Tort Claims Against the United States: Hearings on S. 2690 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., 38 - 39 (1940). The purpose was to avoid duplication; there was no indication that existing remedies, if any, were withdrawn. 444 U.S. 460, 463 n.4.

Thus, Congress felt that public policy does not mandate an exemption for the customs service and Congress never intended that the Government be free from tort claims for this

reason.

In fact, as a policy matter, the Government should be subject to tort claims for their actions in this case.

In the case at bar, the customs agents acted in a reprehensible manner. They posed as merchants from Abraham Weiner & Sons of Camden, New Jersey and tried to talk the Petitioner into selling his art collection (which Petitioner never did). They forced their way into Petitioner's home (with a search warrant which for purposes of this argument Petitioner concedes was valid) and seized his property and personal papers, the latter of which were never returned. When the Government lost the criminal case, they still would not return the property and pursued a forfeiture proceeding which they abandoned. When they finally returned Petitioner's art collection, some of the items were returned in a paper bag broken, cracked and damaged. There was great animosity between the customs agents and the

Petitioner throughout the case. If Petitioner has no recourse for the damages he sustained, then there is nothing to prevent the Customs Service from smashing or destroying any items it seizes as evidence before returning it to its rightful owner.

Secondly, this Court is faced with the meaning of the words "adequate remedies are already available" as used by Mr. Holtzoff. In enacting subsection (c), Congress had wanted to avoid providing a federal remedy that would duplicate already existing procedures for challenging unlawful detentions or excessive duties imposed. Thus, subsection (c) deliberately contains no exemptions from liability for loss or damage to goods while they are being detained by customs. The purpose of the subsection was not to exempt the Customs Service of all liability. It was to avoid interfering with the existing remedial machinery for challenging the detention of goods or the assessment of duties.

Apparently as a result of Mr. Holtzoff's testimony in 1940, the conclusion that some of the exemptions now included in Section 2680 represented instances where "adequate remedies are already available" was repeated in legislative reports and hearings in succeeding years. See Hearings on Tort Claims (H.R. 5373 and H.R. 6463) before the House Committee on the Judiciary, 77th Cong., 2d Sess. 28, 44 (1942); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess. 7 (1942). This consistent pattern demonstrates that the successive Congresses which considered the Federal Tort Claims Act provisions in the several years prior to its passage viewed subsection (c) as granting no real exemption. It was rather, designed to prevent owners of detained goods from pursuing an overlapping or additional remedy.

The statutory remedies which Congress wished to leave undisturbed permitted challenges to (1) the propriety of a detention and (2) the duty assessed. 19 U.S.C.

§§1602-1614 (1946); 19 U.S.C. §§1514-1519 (1946); 28 U.S.C. §§296-297 (1946); 28 U.S.C. §§2674 (1940). There were, on the other hand, no particular statutory procedures for the recovery of damages for loss or damage to goods while in the custody of Customs officers. The exception now contained in Section 2680(c) was limited, therefore, to suits challenging the imposition of duties or a decision to detain goods. It was not a blanket exemption for all activities of Customs officers, and it was surely not an exemption from liability for the loss of goods held in the custody of the Customs Service.

This interpretation of the legislative history of subsection (c) is corroborated by the unanimous view of several law review articles of which this Court is already aware and cited in Hatzlachh, supra.: See 2L. Jayson, Personal Injury Handling Federal Tort Claims §256 (1979); Gellhorn & Schenck, Tort Actions Against the Federal Government, 47 Colum.L.Rev. 722, 729-730 (1947); Gottlieb,

The Federal Tort Claims Act--A Statutory Interpretation, 35 Geo.Law J. 1, 45 (1946); Comment, The Federal Tort Claims Act, 42 Ill.L.Rev. 344, 360 (1947); Note, The Federal Tort Claims Act, 56 Yale L.J. 534, 547-548 (1947).

Thus, Congress never intended to shield the Government from liability in this case.

B. THE LANGUAGE USED BY CONGRESS IN ENACTING SECTION 2680(c) DOES NOT BAR THE PETITIONER FROM BRINGING SUIT FOR DAMAGE.

In the instant case, it was not the detention of these collectibles, but their careless and destructive mishandling by customs officials or the United States Attorney's office which caused the breakage and loss. The ninth circuit in A-Mark, Inc. v. United States Secret Service, 593 F.2d 849 (9th Cir. 1978) and Alliance Assurance Co. v. United States, 252 F.2d 529 (2d Cir. 1958) reasoned that the exemption of §2680 (c) does not cover negligent handling of the goods but only bars damages for claims

caused by the detention itslef.

It is sensible to view §2680(c) as did the court in Alliance and A-Mark. The exception provides an umbrella protection so that customs officials may inspect goods carefully and slowly, free from claims that their prolonged or illegal detentions have caused losses to persons. The exception is not, however, a carte blanche to carelessness.

The Alliance court, supra., also pointed out one other important factor. §2680(b) expressly bars actions against the postal service for negligent transmission of postal matter. This court then went on to state:

> "If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U.S.C.A. §2680(b) shows that it would have been equal to the task. The conclusion is inescapable that it did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others." 252F.2d 529, 534.

As was pointed out in the dissent in the case at bar, the Court should look at the logic and language of the exception. As was stated by Judge Weiss,

> "By its terms, it excludes any claim 'arising in respect of ... the detention of any goods... .' Webster's Third International New Dictionary 1934 (1968) defines 'in respect of: to mean 'as to: as regards: insofar as concerns: with respect to.' These definitions indicate that the statutory exception is directed to the fact of detention itself, and that alone. The language is not broad enough to exempt a claim for damage occurring 'during' detention." 679 F.2d 306, 310.

The Petitioner had the right to have his property returned to him in undamaged condition. He should be compensated by the United States for the damage that was done.

There is no justification to allow the Government to take property from its citizens without their consent and return it in damaged condition. It is unfair to make the Petitioner bear the loss in this situation. The Petitioner had every right to have his

property returned to him in the same condition in which it was seized. The threat of a damage suit will force the customs service to properly care for anothers property. Congress never meant to give the Customs Service a license to destroy property.

II. THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT.

The federal courts are uniform in their position that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 2L Ed. 2d 80, 78 S.Ct. 99, at 355 U.S. 45-46 (1957).

One of the items destroyed by Customs was broken while the search warrant was being executed. It was not one of the items detained by Customs and thus the exemption does not apply. Also, damages were alleged for failure to return a stereo receipt which

was seized with Petitioner's personal papers. The exemption states that it is only for damage to goods and merchandise and thus it doesn't apply to damages caused by failure to return the receipt. Thus, even if the exemption barred most of Petitioner's law suit, he still could prove a set of facts to recover for one of the items that was destroyed and for his damages in not getting back the receipt.

CONCLUSION

For the foregoing reaons, the judgment of the District Court and the Court of Appeals should be reversed and the matter remanded to the District Court.

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No. 82-618

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH A. KOSAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the provision of the Federal Tort Claims Act, 28 U.S.C. 2680(c), that bars "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs" precludes a claim against the United States for negligent damage to property being detained for investigation by the Customs Service.

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In the Supreme Court of the United States

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No. 82-618

JOSEPH A. KOSAK, PETITIONER

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 679 F.2d 306.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12) was entered on May 19, 1982, and a petition for rehearing was denied on June 24, 1982 (Pet. App. 13). The petition for a writ of certiorari was docketed on October 7, 1982, retroactive to September 21, 1982. The petition was granted on January 10, 1983.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Federal Tort Claims Act provides in pertinent part:

1. 28 U.S.C. 1346(b):

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. 2680:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * * *
>
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

STATEMENT

When petitioner, then a member of the Navy, was transferred to Philadelphia, Pennsylvania, from his former station in Guam, he brought with him a number of items of oriental art.[1] On February 28, 1978,

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[1] Pursuant to 19 U.S.C. 1202, Guam is outside the customs territory of the United States, and all goods imported therefrom are potentially dutiable.

agents of the United States Customs Service, acting under the authority of a search warrant, seized from petitioner's house certain of those art objects on suspicion that petitioner had brought them into the United States intending to resell them, contrary to the statements contained in his customs declaration indicating that he intended to keep them for his personal collection (Pet. 2-3; J.A. 8, 11).[2] Following a jury trial, petitioner was acquitted of the charge of smuggling the goods into the country in violation of 18 U.S.C. 545 (Pet. App. 2). Thereafter, the Customs Service notified petitioner that the goods were subject to civil forfeiture for violation of 19 U.S.C. 1592.[3] Petitioner filed a petition for relief from the forfei-

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[2] Petitioner accuses the customs agents of acting in a "reprehensible manner" (Br. 9). But the affidavit supporting the search warrant indicates that the customs agents had ample cause to believe that petitioner, contrary to his sworn customs declaration, intended to resell the 20 boxes of oriental art he was importing. The items had an estimated value of $98,000. The size and value of the shipment alone raised the possibility that it was being made for commercial purposes. And when one of the customs agents, acting in an undercover capacity, delivered the shipment to petitioner, petitioner made a number of incriminating statements, including an offer to sell some of the items to the agent. Petitioner also told the agent that it was necessary to "lie a little" in order to "beat Customs." A copy of the affidavit in support of the search warrant has been lodged with the Clerk of this Court and served on petitioner's counsel.

[3] Section 1592 permits the forfeiture of goods whenever they are brought into the United States "by means of any false statement." Petitioner's acquittal on the criminal charge would not, of course, be binding in a civil forfeiture proceeding because of the different standards of proof. See *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232, 234-235 (1972).

ture under 19 U.S.C. 1618,[4] which the Customs Service subsequently granted. The Service returned the goods on June 1, 1979 (J.A. 4).

On September 21, 1979, petitioner filed an administrative claim with the Customs Service, alleging that some of the art objects had been damaged while being seized or while in the Service's possession. Relying on the preservation of sovereign immunity contained in 28 U.S.C. 2680(c), the Customs Service denied the claim (J.A. 8-9). Petitioner then filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking approximately $12,000 for alleged damage to the property. Petitioner also sought $300 to cover the amount he paid for the repair of a stereo receiver, which he alleged he could not get repaired for free under warranty because the Customs Service had seized the sales receipt he needed to prove the date of purchase (J.A. 5). The United States moved to dismiss the complaint or for summary judgment on the basis of 28 U.S.C. 2680(c) (C.A. App. 13, 15). The district court granted the government's motion to dismiss the complaint (Pet. App. 14), and petitioner appealed.

The court of appeals affirmed, with one judge dissenting (Pet. App. 1-11). Noting (*id.* at 4 & n.3) that the lower courts have disagreed as to the scope

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[4] Section 1618 authorizes the Secretary of the Treasury to remit or mitigate a forfeiture "if he finds that such * * * forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such * * * forfeiture * * *."

of Section 2680(c), and that this Court declined to resolve that disagreement in *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 462-463 n.3 (1980), the court of appeals aligned itself with the decisions holding that the exception embraces all claims for damages arising out of the detention of goods in the custody of the Customs Service, and not merely claims for damages caused by the fact of detention alone. The court declined to follow *Alliance Assurance Co.* v. *United States*, 252 F.2d 529 (2d Cir. 1958), the first of the cases holding that Section 2680(c) preserves sovereign immunity only for claims arising out of the mere fact of detention, and not for claims of damage to or loss of the property.[5] The court concluded that the rationale of *Alliance* ignored "the clear language of §2680(c), the legislative intent, and specific teachings of the Supreme Court regarding interpretation of exceptions to the FTCA" (Pet. App. 5). Accordingly, the court held (*id.* at 6):

> [T]he language of the statute covers all claims arising out of detention of goods by customs

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[5] *Alliance* was followed by the Ninth Circuit in a short, per curiam opinion that quotes the entire discussion of the issue in *Alliance* but adds no additional discussion. *A-Mark, Inc.* v. *United States Secret Service*, 593 F.2d 849 (1978). See also *A & D International, Inc.* v. *United States*, 665 F.2d 669 (5th Cir. 1982). On the other hand, the position adopted by the Third Circuit in the instant case was also taken in *United States* v. *One (1) Douglas A-26B Aircraft*, 662 F.2d 1372 (11th Cir. 1981); *United States* v. *One (1) 1972 Wood, 19 Foot Custom Boat*, 501 F.2d 1327, 1330 (5th Cir. 1974); and *S. Schonfeld Co.* v. *SS Akra Tenaron*, 363 F. Supp. 1220 (D.S.C. 1973).

officers and does not purport to distinguish among types of harm.

Moreover, the legislative history of §2680(c) reveals no "clearly expressed legislative intention" [quoting *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)] contrary to the ordinary meaning of the section's language. * * * There is nothing in the legislative history to show that this exemption was to be restricted to claims in conversion.

SUMMARY OF ARGUMENT

When it enacted the Federal Tort Claims Act, making the United States generally liable for torts committed by federal employees under circumstances in which a private person would be liable, Congress chose to proceed cautiously by excepting certain core governmental activities from the general waiver of sovereign immunity. Torts "arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs" (28 U.S.C. 2680(c)) were among the specific exceptions Congress enacted. To prevail here, therefore, petitioner must demonstrate that the plain language employed by Congress does not mean what it says. All relevant evidence precludes such a showing.

I.

A. The language of Section 2680(c) is exceedingly broad. It encompasses "any" claim arising "in respect of" the assessment or collection of customs duties or the detention of property by customs officers. The ordinary meaning of the words employed by Congress necessarily encompasses negligent damage to goods while they are in the custody of the Customs

Service pursuant to an investigation of the appropriate customs duty.

Petitioner's contrary construction would carve out the heart of Section 2680(c) by eliminating from the exception direct and immediate damages (such as injury to property), while retaining the exception only for remote and consequential damages arising out of the mere fact of detention (such as loss of the use of property). The effect would be to render Section 2680(c) mere surplusage because the United States has waived sovereign immunity only for claims of "injury or loss of property" (28 U.S.C. 1346(b)), and consequential damages caused by the fact of detention alone involve no injury or loss of property.

Thus, unless Section 2680(c) encompasses claims for negligent damage to property, it serves no purpose in the statutory scheme. Even without benefit of the rule requiring waivers of sovereign immunity to be construed in the government's favor, petitioner's reading of the statutory language is unnatural and perverse.

B. The legislative history of the Federal Tort Claims Act confirms that Section 2680(c) must be given its natural reading. The exemptions to the waiver of sovereign immunity were drafted by the Department of Justice at Congress' request, and the materials relied on by the Department in drafting the detention of property exemption clearly reveal that the Department intended to exempt claims for negligent damage to property while in the possession of the Customs Service. The Department used as its model a British bill that exempted claims "for or in respect of the loss of or any deterioration or damage occasioned to" goods or merchandise detained by customs officers. Nothing in the legislative history of

the FTCA suggests that Congress intended Section 2680(c) to have a narrower scope.

C. Congress had multiple purposes in mind when it enacted the exemptions to the Federal Tort Claims Act, and all of those purposes are furthered by giving Section 2680(c) its natural meaning. First, Congress thought that certain governmental activities were too important to be restrained by the threat of damages suits. Enforcement of the customs laws of the United States is clearly one such core governmental function. Second, Congress was concerned that certain types of tort suits would be difficult to defend against and would lend themselves to fraudulent or excessive claims. The wisdom of Congress' concern is apparent in light of the enormous diversity of items seized by the Customs Service, the vast number of seizures, and the impossibility of conducting moment-of-detention inspections to foreclose later disputes about whether property has been damaged. Finally, Congress was aware that in certain instances alternative remedies already existed, and it did not want to create overlapping or duplicate remedies. Congress undoubtedly knew that suits against the customs collector in his personal capacity for the negligent loss of or damage to goods had long been recognized at common law. It thus saw no need to create an additional remedy.

II.

The Court should not consider petitioner's argument that the district court erred in dismissing the entire complaint because this argument was not raised below. In any event, the district court correctly dismissed the entire complaint because all items of damage claimed by petitioner arose "in respect of" the assessment or collection of customs duties or the de-

tention of his merchandise. Indeed, the consequential damages allegedly caused by the detention of the sales receipt for a stereo receiver are precisely the type of damages attributable to the fact of detention alone and thus may not be recovered even under petitioner's interpretation of Section 2680(c). Moreover, because petitioner suffered no "injury or loss of property" from the detention of the sales receipt, the claim does not fall within the waiver of sovereign immunity contained in 28 U.S.C. 1346(b).

Finally, petitioner did not claim in the lower courts that one of his art objects was never "detained" because it was broken during execution of the search warrant; rather, he included this item along with all other "detained" items. In any event, inspection of an item in order to execute a search warrant for possible violations of the customs laws arises "in respect of" the assessment and collection of customs duties and constitutes a "detention" within the meaning of Section 2680(c).

ARGUMENT

I. 28 U.S.C. 2680(c) PRECLUDES CLAIMS AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT FOR NEGLIGENT DAMAGE TO PROPERTY BEING DETAINED FOR INVESTIGATION BY THE CUSTOMS SERVICE

In 1946, following nearly 30 years of congressional consideration, see *Dalehite* v. *United States*, 346 U.S. 15, 24 (1953), Congress enacted the Federal Tort Claims Act, making the United States generally liable, to the same extent as a private party, for money damages "for injury or loss of property" caused by negligent acts of federal employees acting within the scope of their employment (28 U.S.C. 1346(b)). At the same time, Congress preserved sovereign immunity for "certain governmental activities which should

be free from the restraint of damage suits or for which adequate remedies are already available." *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 33 (1942) (hereinafter "*1942 Hearings*").[6] See also S. Rep. No. 1196, 77th Cong., 2d Sess. 7 (1942); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946).

Among the governmental activities for which Congress chose to preserve sovereign immunity was the assessment or collection of taxes and customs duties and the detention of property by customs, tax and other law enforcement officers (28 U.S.C. 2680(c)).[7] These core governmental functions are recognized in the Constitution itself: Article I, Section 8, Clause 1 ("Congress shall have Power To lay and collect Taxes,

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[6] Of course, sovereign immunity was not preserved for ordinary torts dissociated from administration of the governmental duties involved. See Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 548 n.90 (1947) ("Thus a customs official who through negligence mistakenly thought a bottle to contain contraband and smashed it, would thereby impose no liability upon the Government under this Act. But if in so doing he negligently hurt a bystander, this exception would not deny jurisdiction to the courts in an action by the bystander against the United States").

[7] The courts have generally held that Section 2680(c) applies to all federal "law enforcement officers." See cases cited in *A-Mark, Inc.* v. *United States Secret Service*, 593 F.2d 849, 851 (9th Cir. 1978) (Tang, J., concurring). But cf. *ibid.* (expressing the view that the section should be limited to law enforcement officers "acting in a customs or tax capacity"). Although any such limitation is not relevant to this case, we believe Judge Tang was in error, and we assume that Section 2680(c) means what it says, *i.e.*, that it encompasses detentions by any officer of customs or excise "or *any other* law enforcement officer" (emphasis added).

Duties, Imposts and Excises"); Article I, Section 8, Clause 3 (Congress shall have power to "regulate Commerce with foreign Nations"); and the Fourth Amendment ("persons or things to be seized"). Indeed, the first substantive statute adopted by the First Congress was "An Act for laying a Duty on Goods, Wares, and Merchandises imported into the United States." Act of July 4, 1789, ch. 2, 1 Stat. 24 *et seq.* The second substantive statute was "An Act imposing Duties on Tonnage." Act of July 20, 1789, ch. 3, 1 Stat. 27 *et seq.* The fourth substantive act of the First Congress, following creation of the Department of Foreign Affairs (Act of July 27, 1789, ch. 4, 1 Stat. 28 *et seq.*), established the positions of customs collectors. Act of July 31, 1789, ch. 5, 1 Stat. 29 *et seq.* Although customs revenues are no longer the primary source of the government's revenue, they still provide the federal government with almost $10 billion a year in income. U.S. Customs Service, *Customs U.S.A.: A Report on the Activities of the U.S. Customs Service During Fiscal Year 1982*, at 5, 34 (hereinafter cited as "*Customs U.S.A.*").[8] The Customs Service continues to be the principal border enforcement agency, assisting in the administration and enforcement of some 400 provisions of law on behalf of more than 40 government agencies; assessing and collecting customs duties on imported merchandise; preventing fraud and smuggling; and controlling carriers, persons, and articles entering and departing the United States (*id.* at 5).[9] In 1982, the Customs Serv-

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[8] A copy of this report has been lodged with the Clerk of this Court and served on counsel for petitioner.

[9] "[I]n addition to enforcing the Tariff Act of 1930 and other customs statutes, the Customs Service enforces export control laws and intercepts illegal high technology exports to

ice made more than 59,000 seizures, involving almost $240 million in property, for violations of the laws it enforces (not including drug laws) (*id.* at 36).

That the other governmental functions covered by Section 2680(c), taxation and the seizure of property either as contraband or as evidence of crime, are core governmental activities cannot be gainsaid. Thus, when Congress preserved sovereign immunity for "any claim arising in respect of the assessment or collection of any * * * customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer," it was acting to protect governmental activities of the most fundamental importance. It is against this background that the scope of Section 2680(c) must be considered.

A. The Plain Language Of Section 2680(c) Unambiguously Covers Negligent Damage To Property Being Detained For Investigation By The Customs Service

If petitioner's claim for negligent damage to property being detained for investigation by the Customs Service is a "claim arising in respect of the assessment or collection of any * * * customs duty, or the detention of any goods or merchandise," then it is barred by the sovereign immunity of the United States. As this Court has stated on numerous occa-

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Soviet Bloc countries; cooperates with other Federal agencies and foreign governments in suppressing the traffic in illegal narcotics; enforces reporting requirements of the Bank Secrecy Act; * * * and enforces a wide range of requirements to protect the public, such as auto safety and emission control standards, radiation and radioactive material standards, counterfeit money instruments, flammable fabric restrictions, animal and plant quarantine requirements, and food, drug, and hazardous substance prohibitions." *Customs U.S.A., supra,* at 5.

sions, "in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' * * * and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982), quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979), and *Richards* v. *United States*, 369 U.S. 1, 9 (1962).[10]

An examination of the text of Section 2680(c) demonstrates that it would be difficult to draft a broader statute. The section encompasses "any claim" arising "in respect of" the assessment or collection of any customs duty or the detention of any goods or merchandise by any officer of customs. "Any" indicates a thing (here, a claim) "selected without restriction or limitation of choice." *Webster's Third New International Dictionary* 97 (4th ed. 1976). Thus, when Congress said "any" claim, it plainly intended coverage "without restriction or limitation." See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 589 (1980) (footnote omitted) ("the phrase[] 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely *any other* final action").

In choosing the qualifier "in respect of," Congress employed a phrase denoting a relationship in the

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[10] It is also an elementary rule of statutory construction "that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979). Petitioner's contention (Br. 11) "that the successive Congresses which considered the Federal Tort Claims Act provisions in the several years prior to its passage viewed subsection (c) as granting no real exemption" is thus totally untenable.

broadest sense.[11] One court considered this same language "broad enough to encompass any activities of an IRS agent even remotely related to his or her official duties." *Capozzoli* v. *Tracey*, 663 F.2d 654, 658 (5th Cir. 1981). Thus, by its clear and unambiguous language Congress preserved sovereign immunity for every claim in any way related to the assessment or collection of customs duties and the detention of goods and merchandise by customs officers. In this case, the Customs Service seized petitioner's property as part of an investigation into the amount of customs duties owed by petitioner, and thus petitioner's claim arises "in respect of" the assessment or collection of customs duties. Because the Service also detained petitioner's property as part of its investigation, the claim likewise arises "in respect of" the detention of goods or merchandise by customs officers.[12]

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[11] Congress has used the phrases "arising in respect" or "arising with respect" to express the broadest sorts of relationships. See, *e.g.*, 12 U.S.C. 1744 (in exchange for payment of government insurance to lender for defaulted loan, lender must transfer to the Secretary of Housing and Urban Development all rights and interest arising "with respect to" the loan so in default); 27 U.S.C. 207 (authority of Secretary of Treasury to compromise liability "arising with respect to" violations of laws relating to commerce in intoxicating liquors); 42 U.S.C. 295d-2 (Advisory Council on Family Medicine to advise and assist Secretary of Health and Human Services on policy matters "arising with respect to" the administration of the statute); 42 U.S.C. 299e(c) (National Advisory Council on Regional Medical Programs to advise the Secretary of HHS on policy matters "arising with respect to" the administration of the act); 42 U.S.C. 3532(b) (Secretary of HHS to arrange for special working groups to consider special problems "arising with respect to" matters described in the statute).

[12] There surely is no basis in the text of Section 2680(c) for severing "detention" from "of any goods or merchandise," in

Despite this broad language, petitioner (Br. 13-15), citing the dissent below, *A-Mark, Inc.* v. *United*

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order to focus on the mere fact of detention. As noted below (see pages 16-17, *infra*), such a reading of Section 2680(c) would render the exemption meaningless because the mere fact of detention would not even give rise to a claim for "injury or loss of property," as required by 28 U.S.C. 1346(b). Moreover, it is reasonable to assume that Congress, by preserving immunity for the detention of goods, intended also to preserve immunity for those activities that invariably follow from the detention, such as storage and movement of the goods, and from the injuries that are statistically bound to arise from those activities. Indeed, the law of bailments stands as testament to the fact that claims for loss or damage to property given over to another are part and parcel of the entrusting of property to another.

Judge Weis, dissenting below, was able to construe the clause "arising in resepct of * * * the detention of goods" contrary to our position only by severing "the detention" from its immediate modifier, "of goods," and then focusing exclusively on "the detention" (Pet. App. 9). While that might be appropriate had Congress precluded claims arising out of "*the fact of* the detention of goods," the dissent cited no basis whatsoever for rewriting the statute. Nor did Judge Weis cite any authority for his conclusion that the broad indicator of relationship, "arising in respect of," is somehow narrower than other language Congress might have chosen, such as "arising out of" (*id.* at 10). In our view, the language Congress employed and the slightly different hypothetical language stressed by Judge Weis constitute equally broad restrictions on the waiver of sovereign immunity.

Judge Weis found it anomalous that there is no recovery for negligence in this case, but that "[i]f a traveller handed an expensive oriental vase to a customs officer for inspection at a port of entry, and the officer carelessly dropped the vase, damages would be payable under the Federal Tort Claims Act" (Pet. App. 8). But it is not at all clear that an action would lie under the Federal Tort Claims Act in the situation described in Judge Weis's hypothetical example. Damages caused during inspection at a port of entry arise "in respect of" the

States Secret Service, 593 F.2d 849 (9th Cir. 1978), and *Alliance Assurance Co.* v. *United States*, 252 F.2d 529 (2d Cir. 1958), seeks to limit the exemption, not by restricting its breadth, but by carving out its center. Thus, according to petitioner, remote, consequential damages arising out of the fact of detention alone (such as loss of use of the property) would be included, but direct, immediate damages (such as injury to the property) would not. This inverted form of statutory construction finds no support in the language of Section 2680(c) or, as we demonstrate below (pages 19-23, *infra*), in the legislative history. Indeed, petitioner's contention that Section 2680(c) is limited to claims arising out of the fact of detention alone effectively renders the exemption mere surplusage. The United States has waived sovereign immunity only for claims for damages "for injury or loss of property" (28 U.S.C. 1346(b)). See, *e.g.*, *Idaho ex rel. Trombley* v. *United States Department of the Army*, 666 F.2d 444 (9th Cir. 1982), cert. denied, No. 81-1961 (Oct. 4, 1982) (costs of suppressing a fire negligently started by employees of the United States do not involve "injury or loss of property"); *Oregon* v. *United States*, 308 F.2d 568 (9th

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assessment or collection of customs duties and the detention (albeit momentary) of property as clearly as damages occasioned by negligence during a longer period of detention. There is nothing in the language of the statute to suggest that Congress intended to treat the negligent actions of customs agents at ports of entry any differently than the negligent actions of customs agents engaged in a more comprehensive investigation over a prolonged period of time. Neither situation involves the sort of ordinary tort disassociated from the performance of the agents' duties that Congress intended to be within the waiver of sovereign immunity under the FTCA (see page 10 note 6, *supra*).

Cir. 1962), cert. denied, 372 U.S. 941 (1963) (same); *California* v. *United States*, 307 F.2d 941 (9th Cir. 1962), cert. denied, 372 U.S. 941 (1963) (same); see also *County of San Diego* v. *Castillo*, 665 F.2d 1051 (9th Cir. 1981), cert. denied, 455 U.S. 1018 (1982) (alleged negligent failure to keep illegal aliens out of the country, causing county to expend substantial sums for aliens' health care, does not give rise to a claim for "injury or loss of property"). Damages attributable to the temporary detention of goods do not involve "injury or loss of property." Thus, Section 2680(c) must necessarily have a broader reach than petitioner claims, or its enactment would have been unnecessary.[13]

Nor can petitioner find solace in the more specific language of 28 U.S.C. 2680(b), which preserves immunity for "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." Again, petitioner asks the Court to adopt a topsy-turvy method of statutory construction whereby an exceedingly broad statutory provision (Section 2680(c)) is sought to be construed narrowly simply because another provision (Section 2680(b)) is drafted narrowly. Petitioner's argument seems to be that if Congress had intended the broad provision to include the matters specified in the narrow provision it would have specified them in

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[13] Of course, Section 2680(c) also bars suits under the FTCA for damages attributable to a customs detention, and a few courts have dismissed such claims on the basis of that exemption. *United States* v. *1500 Cases, More or Less*, 249 F.2d 382 (7th Cir. 1957); *Jones* v. *FBI*, 139 F. Supp. 38 (D. Md. 1956); *United States* v. *One 1951 Cadillac Coupe de Ville*, 125 F. Supp. 661 (E.D. Mo. 1954).

the broad provision too. But the limitations in Section 2680(b) simply have no relationship to the broad sweep of Section 2680(c). Congress used the specific language in Section 2680(b) because if it had retained immunity for "any claim arising in respect of the transmission of letters or postal matter," it probably would have barred suits for automobile accidents caused by postal employees, and such suits were a primary impetus for adopting the Federal Tort Claims Act. See *General Tort Bill: Hearings Before a Subcomm. of the House Comm. on Claims*, 72d Cong., 1st Sess. 17 (1932) (hereinafter "*1932 Hearings*") ("I suppose that the bulk of the cases we are trying to take care of are personal-injury cases caused by the automobiles of the post-office service. There are no exceptions covering those.").

In short, there is nothing in the text of Section 2680(c), or elsewhere in the FTCA, even to suggest that Congress intended something less than the comprehensive retention of sovereign immunity created by the broad language of that section.[14] In the absence of some extraordinary indication in the legislative history that Congress intended to waive immunity for negligent damage to property detained by the Customs Service, the broad statutory language must control.[15]

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[14] Although we agree with the court of appeals (Pet. App. 6) that the exceptions to the FTCA, being reservations of sovereign immunity, must be construed broadly in the government's favor, we believe our construction of Section 2680(c) should prevail under any reasonable rule of statutory construction.

[15] The cases, textbooks and law review articles cited by petitioner (Br. 12-13) do not advance his case. The cases all rely on the Second Circuit's decision in *Alliance Assurance Co.* v. *United States, supra*. *Alliance*, in turn, disregarded the statu-

B. The Legislative History Supports The Plain Meaning Of Section 2680(c)

The preservation of sovereign immunity for claims arising in respect of the detention of property first appeared in bills introduced on December 9, 1931. H.R. 5065, 72d Cong., 1st Sess. § 206(2); S. 211, 72d Cong., 1st Sess. § 206(2). The language was the same as that found in Section 2680(c) today. Prior bills had contained the first clause ("[a]ny claim arising in respect of the assessment or collection of any tax or customs duty"), but not the detention of property clause. See, *e.g.*, S. 1912, 69th Cong., 1st Sess. § 8(a)(2) (1926); H.R. 17168, 71st Cong., 3rd Sess. § 3(a)(2) (1931).

H.R. 5065 (and presumably the identically-worded S. 211) was drafted by the General Accounting Office and the Department of Justice, at the request of Representative Collins, who introduced it. The bill was a composite of the views of the Attorney General and the Comptroller General. *1932 Hearings*, *supra*, at 7, 22. With regard to the exceptions to the waiver of sovereign immunity in the bill, Assistant Attorney General Rugg testified (*id.* at 17):

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tory language, the legislative history, and Congress' purposes in enacting the FTCA exemptions generally (see pages 23-32, *infra*). The decision rested almost entirely on the court's comparison of the language of Section 2680(c) and Section 2680(b) (*Alliance Assurance Co.* v. *United States*, *supra*, 252 F.2d at 534). As we have shown above, however, the specific language of Section 2680(b) in no way limits the much broader language of Section 2680(c). 2 L. Jayson, *Personal Injury: Handling Federal Tort Claims* § 256 (1983), simply cites *Alliance* (see *id.* § 256.03), the Yale Law Journal Note supports our position (see page 10 note 6, *supra*), and the other law review articles do not address the precise issue presented by this case.

> [W]e have provided a list of 13 exceptions to liability and responsibility of the United States for tort actions. Those were prepared quite thoughtfully after a conference with every department and independent establishment in Washington, and receiving their suggestions, to meet any case where there might be an opportunity for fraudulent and excessive claims and where there was not any genuine, moral responsibility on the part of the Government.

In discussing the exceptions generally, Assistant Attorney General Rugg did indicate that immunity would be waived for "property damage claims" arising out of the "taking of property" by the government "in connection with war-time legislation." *1932 Hearings*, *supra*, at 18. But he made no such statement with regard to the customs exemption, nor did he otherwise indicate that the broad language of the exemption relating to the assessment or collection of customs duties and the detention of property by customs, tax, and other law enforcement officers would not have its apparent reach (*ibid.*).

Although the Department of Justice added the detention of property clause to the tort claims bills at about the time of the conferences with the other Executive Branch establishments, the clause did not actually originate with those conferences. Rather, its origins trace back to a 1927 British report recommending a tort claims bill for Great Britain. As Alexander Holtzoff [16] explained, speaking of a pro-

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[16] Judge Holtzoff, then a Special Assistant to the Attorney General, played a critical role in the development of the Federal Tort Claims Act. See Borchard, *The Federal Tort Claims Bill*, 1 U. Chi. L. Rev. 1 n.2 (1933) ("Great credit is also due to Mr. Alexander Holtzoff of New York, Special Assistant to the Attorney General, who was assigned by Attorney General

posed bill he had drafted, which contained the exception as introduced in H.R. 5065 and as finally enacted in Section 2680(c) (Holtzoff, *Report on Proposed Federal Tort Claims Bill* 16; emphasis added) (hereinafter "*Holtzoff Report*")[17]:

> [The proposed bill excepts] [c]laims arising in respect of the assessment or collection of any tax or customs duty. This exception appears in all previous drafts. *It is expanded, however, so as to include immunity from liability in respect of loss in connection with the detention of goods or merchandise by any officer of customs or excise. The additional proviso has special reference to the detention of imported goods in appraisers' warehouses or customs houses, as well as seizures*

Mitchell to the special task of co-ordinating the views of the Government departments and whose detailed criticisms of the bill helped greatly in the formulation of the latest, and possibly, final draft" [referring to S. 4567, 72d Cong., 1st Sess. (1932), one of the early bills containing the detention of property clause]).

[17] A copy of this report has been lodged with the Clerk of this Court and served on petitioner's counsel. The *Holtzoff Report*, containing Judge Holtzoff's proposed bill, is undated, but a cover memorandum indicates that it was submitted to Assistant Attorney General Rugg on September 25, 1931. Assistant Attorney General Rugg, in turn, sent it to the General Accounting Office (an arm of Congress) sometime prior to October 27, 1931 (see Memorandum for the Attorney General, *In re Tort Claims Act* (Oct. 27, 1931)). Although we have been unable to find any record of the report's transmission to Congress itself, it seems more probable than not that Congress received the report because Congress never considered a bill with the detention of property clause until it took up H.R. 5065, 72d Cong., 1st Sess. (1931). As noted (page 19, *supra*), that bill was drafted by the Department of Justice and the General Accounting Office and was introduced a few months after the *Holtzoff Report* appears to have been written.

> *by law enforcement officials, internal revenue officers, and the like. This provision is suggested in the proposed draft of the bill submitted by the Crown Proceedings Committee in England in 1927* * * *.

The relevant section in the Report of the Crown Proceedings Committee [18] reads as follows (Crown Proceedings Comm., *Report* § 11(5)(c), at 18 (Apr. 1927); emphasis added):

> No proceedings shall lie under this section—
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> * * * * *
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> (c) *for or in respect of the loss of or any deterioration or damage occasioned to,* or any delay in the release of, any goods or merchandise by reason of anything done or omitted to be done by any such officer of customs and excise acting as such[.] [19]

It was this subsection that prompted Judge Holtzoff to expand the customs exemption expressly to cover "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs or excise, or any other law enforcement officer" (*Holtzoff Report, supra*, addendum entitled "A Bill to Provide for the Settlement of Claims Against the United States on Account of Property Damage, Personal Injury or Death" § 4(2), at 2). Nothing in Judge Holtzoff's report, or anything else we have seen, even suggests that this broad language was

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[18] A copy of the Report of the Crown Proceedings Committee has been lodged with the Clerk of this Court and served on petitioner's counsel.

[19] Apparently, the detention of goods proposal in the British bill was never enacted into law in Great Britain. See Crown Proceedings Act, 1947, 10 & 11 Geo. 6, ch. 44.

thought to exclude any of the specifics listed in the British bill, and the natural reading of Judge Holtzoff's language is, as we have demonstrated, all-inclusive. And while there is no evidence that Congress actually saw the British bill, it enacted Judge Holtzoff's all-inclusive language in a bill that it had asked the Department of Justice and the General Accounting Office to draft. In essence, Congress intended to enact the proposal of the Department of Justice, and the Department intended the provision that became Section 2680(c) to exclude from the waiver of sovereign immunity all claims relating in any way to detention of goods by customs agents, including claims listed in the British report. Thus, the legislative history of Section 2680(c) fully supports the plain meaning of the broad statutory language.

C. The Congressional Purposes Behind The FTCA Exemptions Support The Plain Meaning Of Section 2680(c)

Congress enacted the Federal Tort Claims Act exemptions for a number of reasons: because certain governmental activities should be free from the restraint of damages suits against the United States; because certain claims would be difficult to defend against; because certain types of activities presented the opportunity for fraudulent and excessive claims; and because, with regard to certain activities, adequate remedies already existed.[20] Each of these con-

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[20] See *1942 Hearings*, *supra*, at 33. See also *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 22 (1940) ("The theory of these exemptions is that, since this bill is a radical innovation, perhaps we had better take it step by step and exempt certain torts and certain

gressional purposes supports the plain meaning of Section 2680(c).[21]

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actions which might give rise to tort claims that would be difficult to defend, or in respect to which it would be unjust to make the Government liable"). Immunity was also retained to guard against those situations "where there might be an opportunity for fraudulent and excessive claims * * *." *1932 Hearings*, *supra*, at 17.

Regarding the exemption for "the assessment or collection of any tax or customs duty," O.R. McGuire, counsel to the Comptroller General, indicated that injuries arising out of those activities were "taken care of under the taxation and customs laws, and the Government does not want to provide for a tort action in those instances, because there is a civil action that would take care of the situation to a large extent, though not fully." *1932 Hearings*, *supra*, at 18. Although it is not clear, McGuire's reference to an existing civil action may have been to the traditional common law remedy against customs collectors. See pages 29-32, *infra*. It is also not clear whether his statement was meant to encompass the detention clause of the customs exception, or only the assessment and collection clause, but his statement explicitly referenced only the latter.

[21] Petitioner assumes (Br. 10-12) that the only reason Congress preserved immunity for the detention of goods was because other alternative remedies existed. But the legislative history shows that Congress adopted the FTCA exceptions to address a variety of concerns, and there is no basis for assuming that these concerns did not apply to the assessment or collection of customs duties and the detention of goods. In any event, whatever uncertainty exists with respect to Congress' specific purpose in enacting Section 2680(c) only underscores the need to rely on the most certain indicator of legislative intent, the statutory language. Some congressmen may have felt that Section 2680(c) would protect core governmental activities from the danger of private lawsuits; some may have believed that there was no need to provide yet another remedy; some may have been persuaded by the distinctions between suits against the collector and suits against the United States

1. The preservation of sovereign immunity in Section 2680(c) relates to the detention of property in connection with three governmental activities: customs, tax, and general law enforcement. The core governmental nature of these activities has already been discussed (see pages 10-12, *supra*). Given the long history of sovereign immunity for torts committed by federal employees, and in light of the difficulties encountered by those attempting to pass a general tort claims act, it is not surprising that Congress preserved immunity for such core activities, "doubtless induced by the effort to confine the new policy within a narrow range, dictated by caution." Borchard, *The Federal Tort Claims Bill*, 1 U. Chi. L. Rev. 1, 4 (1933) (commenting on S. 4567, 72d Cong., 1st Sess. (1932), one of the early bills containing the detention of property exception). Congress obviously felt that such a "radical innovation" (*Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 22 (1940)) as making the sovereign answer generally for tort claims was too "dangerous" (*Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 13 (1940)), at least with regard to such core governmental activities.

This view is confirmed by the subject matter covered in the other express exemptions in the FTCA.

(see page 13, *infra*). We cannot be sure. But what we do know is that Congress decided that there should be a broad preservation of sovereign immunity for "*any* claim arising *in respect of* the assessment or collection of any * * * customs duty, or the detention of goods and merchandise by any officer of customs" (emphasis added).

See, *e.g.*, 28 U.S.C. 2680(a) (exempting from the waiver of immunity claims arising out of the non-negligent execution of a statute or regulation); 28 U.S.C. 2680(e) (exempting claims arising out of 50 U.S.C. (& Supp. V) App. 1-31 (Trading with the Enemy Act of 1917)); 28 U.S.C. 2680(f) (exempting claims arising out of quarantines); 28 U.S.C. 2680(i) (exempting claims caused by fiscal operations of the Treasury or by regulation of the monetary system); 28 U.S.C. 2680(j) (exempting claims arising out of combatant activities during time of war). As with the exemption at issue in this case, these exemptions preserve immunity for core governmental activities. Clearly, it is for Congress, should it choose, to extend the waiver of sovereign immunity into these areas.[22]

2. It would indeed be difficult for the Customs Service to defend against many suits for damage to property that it detains. Customs detains all sorts of property: vehicles, aircraft, vessels, general merchandise, machinery, animals, plants. The difficulties of defending against negligence suits for damage to detained property are obvious, for it is not always possible for Customs employees at the moment of detention to make a thorough inventory of the property's condition, and, after that moment passes, the matter becomes a fruitless contest between the shipper or

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[22] That Congress in 1974 eliminated from Section 2680(h) the exception for claims arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution committed by federal investigative or law enforcement officers does not detract from the fundamental importance of law enforcement activities. Rather, it demonstrates a degree of congressional reponsiveness to the need for periodic reconsideration of the assumptions underlying the original FTCA exemptions.

transporter, who "knows" the property was in perfect condition when seized, and the Customs employees, who "know" the property was handled carefully. With regard to perishable goods, property that might need special maintenance, or animals and plants, there would be disputes over whether Customs officials were advised of the property's special needs. And all this would be aggravated by the often adversary nature of Customs' relationship with those from whom it seizes property. Such persons might well be motivated to attempt to recoup duties assessed or collateral losses (or simply to vent their resentment) through litigation over alleged damage to the property while in the hands of Customs.[23] Cf. *Bris-*

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[23] Petitioner argues (Br. 10) that if he has "no recourse for the damages he sustained, then there is nothing to prevent the Customs Service from smashing or destroying any items it seizes as evidence before returning [them] to [their] rightful owner." But any employee who deliberately damaged or destroyed property detained by Customs would probably be acting outside the scope of his employment, and thus his actions would not fall within the waiver of sovereign immunity in the FTCA in any event (28 U.S.C. 1346(b)). Moreover, the deliberate destruction of property might give rise to an action against the officer in his personal capacity (see pages 29-32, *infra*).

In any event, it is not at all clear that persons in petitioner's position would be benefitted by the construction of Section 2680(c) that he advocates. The return of petitioner's property under 19 U.S.C. 1618 was essentially a matter of grace, committed to the discretion of the Secretary of the Treasury. If the Customs Service is to be held liable for negligent damage to goods in its possession, it seems likely that discretionary forfeiture remissions would occur less frequently than they do now because the government could avoid liability simply by carrying the forfeiture proceedings to conclusion. (In 90% of all customs seizures, the claimant files an administrative petition for remission or mitigation. The Customs Service in turn grants at least partial relief for approximately 75% of the

coe v. *LaHue*, No. 81-1404 (Mar. 7, 1983), slip op. 18; *Imbler* v. *Pachtman*, 424 U.S. 409, 425 (1976).

These same considerations relate to Congress' desire to preclude suits presenting the opportunity for fraudulent and excessive claims. The Court has expressly recognized that the government's need to protect against false claims of lost or stolen property is "crucial." *South Dakota* v. *Opperman*, 428 U.S. 364, 376 n.10 (1976). In dealing with so many seizures of so many different types of property under such varied conditions from such a generally antagonistic clientele, the government would, if it waived sovereign immunity, expose itself to several thousand lawsuits a year, involving property valued at hundreds of millions of dollars (see pages 11-12, *supra*).[24] A more ready potential for fraudulent and excessive claims is difficult to imagine.

Only by vastly increasing its work force could the Customs Service undertake the sort of moment-of-detention inspections that would be needed to protect against such claims. And it still would be impossible, regardless of personnel availability, to protect against fraudulent and excessive claims in all circumstances.

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petitions. *United States* v. *$8,850*, No. 81-1062 (May 23, 1983), slip op. 3. By contrast, Customs advises us that it is successful in about 80% of all contested forfeiture actions.) And even if the Customs Service did return the property, it would seem open to the government to prove that no damages were sustained because the property was subject to complete forfeiture. In petitioner's case, this would mean that his claim of $12,000 in damages could be negated by the government's ability to prove its entitlement to his entire shipment, valued at approximately $100,000.

[24] To these figures, of course, must be added the number and value of detentions made by tax and other federal law enforcement officers.

Determining the condition of machinery, for example, could require its disassembly. And even then, some items cannot be disassembled. For all these reasons, Congress could sensibly decide that it was unwilling to impose burdens that would interfere substantially with the smooth functioning of the Customs Service by allowing tort claims for damage to property detained by customs officers.

3. Finally, Congress undoubtedly was familiar with the long recognized common law tort action against the customs collector for negligent loss of or damage to goods in his possession, and it likely considered that as one of the "adequate remedies * * * already available." *1942 Hearings, supra*, at 33.

Customs collectors were, at common law, considered "quasi-bailees" of goods and merchandise detained for violations of the customs laws.[25] See J. Story, *Law of Bailments* §§ 613, 618, at 597, 599 (7th ed. 1863) (hereinafter "*Story on Bailments*"). If property was properly seized by the collector and forfeited to the government, the claimant was not, of course, entitled to its return. But if the property was not forfeited, then customs collectors could be held "liable in their individual capacities for tortious conduct committed in the performance of their duties." *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146, 1149 (4th Cir. 1974). If the customs officers seized the property "tortious[ly], and without any reasonable cause" (*Story on Bailments, supra*, § 613, at 597), then they could be held to answer for conver-

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[25] As agents of the governemnt, customs collectors are true bailees for the government of property seized under a claim of government title. As owner, the government has the right to demand immediate possession. See *United States* v. *Thomas*, 82 U.S. (15 Wall.) 337, 352 (1873).

sion or trespass and would be strictly liable for goods lost or damaged while in their possession (*id.* at 599). If the seizure was justifiable (albeit ultimately held to have been erroneous), the customs officers were liable only on a theory of negligence for breach of the "official obligation, as imposed by law," to exercise "reasonable diligence" in the performance of the duties of office. *United States* v. *Thomas*, 82 U.S. (15 Wall.) 337, 342-343 (1873). See also *Story on Bailments*, *supra*, § 613, at 597; *Agnew* v. *Haymes*, 141 F. 631, 641 (4th Cir. 1905).

Congressional enactments have long assumed the quasi-bailee status of the customs collector. If, in a forfeiture proceeding, judgment is entered for the claimant, the goods must be returned "forthwith." 28 U.S.C. 2465.[26] A customs officer who fails to do so may be sued personally for damages. *States Marine Lines, Inc.* v. *Shultz*, *supra*, 498 F.2d at 1148-1151. In the personal action against the collector, if the court holds that the seizure was made without probable cause, the officer is strictly liable for the loss of or damage to goods in his possession. He may even be personally liable for consequential damages arising out of the seizure. See *Agnew* v. *Haymes*, *supra*, 141 F. at 641. On the other hand, if there was probable cause for the seizure, the officer is liable only for negligent loss of or damage to the property while in his possession. Moreover, the judgment entered may not be executed against the collector, but "shall be paid out of the proper appropria-

[26] However, "if it appears that there was reasonable cause for the seizure," the court must enter a certificate to that effect, and the customs officer will thereby be free, as a matter of law, from an award of costs and from suit or judgment on account of the forfeiture proceeding. 28 U.S.C. 2465.

tion by the Treasury." 28 U.S.C. 2006. See *States Marine Lines, Inc.* v. *Shultz*, *supra*, 498 F.2d at 1149-1150.

As we have seen, there is no evidence in the language or legislative history of the Federal Tort Claims Act to suggest that Congress intended to shift to the United States the potential tort liability of the collector. If the Court were to accept petitioner's construction of Section 2680(c), the established limitations on the liability of the United States under 28 U.S.C. 2006 would be impliedly repealed, *i.e.*, the United States would be liable for negligent damage to property seized without probable cause. Repeals by implication are, of course, disfavored (see, *e.g.*, *Watt* v. *Alaska*, 451 U.S. 259, 273 (1981)), and thus Section 2680(c) should not be read to "drain 28 U.S.C. §§ 2006 and 2465 of any purpose." *States Marine Lines, Inc.* v. *Shultz*, *supra*, 498 F.2d at 1150.

It thus seems likely that Congress decided to preserve sovereign immunity for all claims arising with respect to the assessment or collection of customs duties and the detention of goods because it deemed the existing remedies to be adequate.[27] Any short-

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[27] In addition to suits against the customs collector personally, there may be an alternative remedy. In *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460 (1980), the Court held that Congress' passage of Section 2680(c) was not intended to bar the filing of an action for breach of contract under the Tucker Act, 28 U.S.C. 1491, based on the loss of goods seized for customs violations. The Court remanded the case to the Court of Claims to determine whether a customs seizure gives rise to an implied-in-fact contract of bailment. Justice Blackmun dissented (444 U.S. at 466-468). He agreed that the FTCA did not bar resort to the Tucker Act, but concluded that no implied-in-fact contract could arise from the seizure and

comings in those remedies are for Congress to correct.[28]

II. THE DISTRICT COURT CORRECTLY DISMISSED THE ENTIRE COMPLAINT

Petitioner contends (Br. 16-17) that even if the district court correctly dismissed most of his complaint under 28 U.S.C. 2680(c), it should not have done so with regard to two claims: one for consequential damages arising out of the apparently unintentional detention of petitioner's receipt for the purchase of a stereo receiver and the other for damage done to a piece of art (a cork pagoda) during the execution of the search warrant. Petitioner contends that Section 2680(c), even as construed by the court of appeals, does not encompass these claims. This argument was not raised in the lower courts. Absent exceptional circumstances not present here, this Court will not de-

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forfeiture of goods under the customs laws. Because the Court of Claims has no jurisdiction over contracts implied in law, see *United States* v. *Minnesota Mutual Investment Co.*, 271 U.S. 212, 217-218 (1926), Justice Blackmun thought that the Court's remand in *Hatzlachh* "is, or should be, a useless exercise leading to an inevitable result" (444 U.S. at 467). The remand proceedings in *Hatzlachh* are still pending. On remand, the government has argued, as suggested by Justice Blackmun, that the seizure for forfeiture of goods under the custom laws does not create an implied-in-fact contract of bailment. Should that argument prove unsuccessful, however, persons such as petitioner will be able to seek redress under the Tucker Act as well as through private damages actions against customs officials.

[28] Indeed, it was explicitly recognized that some of the existing remedies to which potential claimants were being remitted "would take care of the situation to a large extent, *though not fully*." *1932 Hearings*, *supra*, at 18 (emphasis added). Nevertheless, Congress chose not to extend the waiver of sovereign immunity to such claims.

cide issues not presented below. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, petitioner's new argument is meritless.

Petitioner's claim for consequential damages flowing from the detention of the sales receipt involves no "injury or loss of property" and thus does not fall within the waiver of sovereign immunity contained in 28 U.S.C. 1346(b). See pages 15-16, *supra*. And even assuming that petitioner had suffered some "injury or loss of property," the injury claimed arose out of the fact of detention alone—precisely the type of claim that petitioner contends is the sole purpose of the FTCA's exception for the detention of goods or merchandise. Petitioner seeks to avoid the exception by arguing (Br. 17) that the receipt does not fall within the meaning of the term "goods or merchandise." But there is no evidence to support the improbable proposition that Congress intended to exclude from that phrase the papers relating to the goods or merchandise detained. On the contrary, the Customs Service normally would seize papers relating to the seized goods or merchandise because they are the primary indicator of value, of the nature of the goods, and of the date and place of purchase. Although the receipt in this case was apparently seized by accident, during the course of the search for and seizure of 20 boxes of art objects, Section 2680(c) bars "any claim" and admits no exception for accidental detentions.[29]

Petitioner contends (Br. 16) that the cork pagoda was broken while the search warrant was being exe-

[29] Moreover, petitioner has not shown why he could not have given other evidence of the date of purchase in order to obtain warranty repairs of the receiver, or submitted the receipt to the company when Customs returned it, with a request for a refund of the $300 paid.

cuted and, therefore, that it was not "detained" by Customs. This argument is multiply flawed. First, whether or not the item was detained, petitioner overlooks the first clause of Section 2680(c), barring claims "in respect of the assessment or collection of any * * * customs duty." See page 14, *supra*. Second, petitioner's complaint did not allege that the cork pagoda was damaged during the search or that it was not "detained." Rather, this item, for which $110 in damages was claimed, was simply listed with all the other "detained" items that petitioner alleged were damaged during the detention (J.A. 5, at ¶ 13m).[30] Nor did petitioner's response to the government's motion for summary judgment or to dismiss, which was based solely on the Section 2680(c) defense, allege other than that the cork pagoda was damaged during a detention (C.A. App. 27-34). And, we can see why: if the pagoda was broken during the course of the search and while being examined to see whether it fell within the limits of the search warrant, which seems likely, then it was being "detained" by a customs officer, albeit perhaps only momentarily, and would be covered by the preservation of sovereign immunity in Section 2680(c). Since there has been no trial, the facts are not known. But petitioner should not be permitted so late in the proceedings to argue a legal theory inconsistent with that asserted in his complaint and in pleadings before the district court.[31]

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[30] By contrast, petitioner separately pleaded the claim for consequential damages due to the seizure of the stereo receiver receipt (J.A. 5, at ¶ 14).

[31] Petitioner faulted the district court (Pet. 10) for not giving reasons for the dismissal of the complaint. But since the government moved to dismiss only on the basis of Section 2680(c), the reason for the dismissal was obvious.

In sum, the district court correctly dismissed the entire complaint because the consequential damages alleged with regard to the detention of the receipt for the stereo receiver involved no "injury or loss of property" and, in any event, arose "in respect of * * * the detention of any goods or merchandise," and because petitioner never asserted other than that the cork pagoda was damaged during a "detention by [an] officer of customs."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 82-618-CFX
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Title: Joseph A. Kosak, Petitioner
v.
United States

Docketed:
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Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Naftulin, Jeffrey L.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 21 1982	G	Petition for writ of certiorari filed.
3	Nov 3 1982		Order extending time to file response to petition until December 6, 1982.
4	Dec 6 1982		Order further extending time to file response to petition until December 13, 1982.
5	Dec 9 1982		Brief of respondent in opposition filed.
6	Dec 15 1982		DISTRIBUTED. January 7, 1983
7	Jan 10 1983		Petition GRANTED.
			**********
8	Feb 28 1983		Brief of petitioner Joseph A. Kosak filed.
9	Mar 10 1983		Record filed.
11	Mar 28 1983		Order extending time to file brief of respondent on the merits until May 2, 1983.
12	Feb 28 1983		Joint appendix filed.
13	Apr 27 1983		Order further extending time to file brief of respondent on the merits until June 1, 1983.
14	Jun 1 1983		Order further extending time to file brief of respondent on the merits until June 10, 1983.
15	Jun 11 1983		Brief of respondent filed.
16	Jun 11 1983		Lodging received. To be returned to the Department of Justice.
17	Jul 8 1983		CIRCULATED.
18	Sep 21 1983		SET FOR ARGUMENT. Monday, November 7, 1983. (1st case) (1 hour)
19	Nov 7 1983		ARGUED.